

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of)

Amendment of the Commission's Rules to)
Establish Competitive Service Safeguards)
for Local Exchange Carrier Provision of)
Commercial Mobile Radio Services)

WT Docket No. 96-162

Implementation of Section 601(d) of the)
Telecommunications Act of 1996, and)
Sections 222 and 251(c)(5) of the)
Communications Act of 1934)

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Amendment of the Commission's Rules)
to Establish New Personal)
Communications Services)

GEN Docket No. 90-314

Requests of Bell Atlantic-NYNEX Mobile,)
Inc. and U S West, Inc. for Waiver of)
Section 22.903 of the Commission's Rules)

COMMENTS OF AIRTOUCH COMMUNICATIONS, INC.

AirTouch Communications, Inc. ("AirTouch") hereby submits the following comments in response to the Notice of Proposed Rulemaking issued in the above-captioned proceeding.¹

Due to the continuing power of the LECs, the interplay between the monopoly franchised provision of local service and the LECs' simultaneous offering of competitive telecommunications services has the potential to seriously restrict competition in the

¹ Notice of Proposed Rulemaking, Order on Remand, and Waiver Order, Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, FCC 96-319 (1996) ("NPRM").

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markets for wireless communications. Safeguards are thus needed to prevent abuse in a number of areas.

It is indisputable that the power of local exchange carriers and the Bell Operating Companies to impede or slow competition in all telecommunications sectors remains strong. As the Commission has noted,

the market power of the BOCs in the landline local exchange and exchange access markets has remained relatively stable, and is likely to remain so until the sweeping market entry and interconnection changes authorized by the 1996 Act have taken hold.²

The Commission determined in 1993 that "[c]ommencement of service by LECs...would be contingent on the LEC implementing an acceptable plan for non-structural safeguards against discrimination and cross-subsidization."³ The proposals contained in the instant Rulemaking are necessary to ensure that such safeguards are properly and effectively implemented.

I. THE NEED FOR SAFEGUARDS

The risk posed by cross-subsidies will continue, and perhaps become even more serious, as LECs develop new wireless ventures. In the absence of meaningful safeguards, incumbent LECs are likely to use their monopoly power to cross-subsidize their new PCS operations. For making LECs eligible for PCS licenses within region

could provide an incentive for LECs to discriminate against PCS competitors requesting interconnection, and could lead to cross-subsidizing PCS operations from expenditures ostensibly made to serve rate-regulated wireline customers.⁴

Monopoly local exchange telephone companies, protected from competition in their franchise areas, will use revenues generated from those monopoly franchises to subsidize competitive PCS or other ventures to the detriment of non-LEC market

² NPRM, paragraph 42.

³ Amendment of the Commission's Rules to Establish New PCS, GN Docket No. 90-314, Second Report and Order, * FCC Rcd 7700, 7747-51 (1993) ("PCS Second Report and Order"), at 7747.

⁴ PCS Second Report and Order, at 7747.

entrants. With such cross-market inequity, competitors, otherwise fully capable of offering competitive services and features, are placed at a distinct disadvantage.

Part 32 and Part 64 cost allocation rules have served to deter discrimination against the enhanced service provider competitors of the Bell Operating Companies when providing integrated enhanced services. Affiliate transaction and Part 64 cost allocation rules, along with price caps for tariffed LEC interstate services, have helped reduce the possibility of unauthorized cost-shifting among LEC interstate services. However, as the Commission has noted, cross-subsidization is still possible for services not subject to "pure" price caps, or services which are still under rate-of-return regulation at the intrastate level.⁵

Further, Part 64 cost accounting rules provide only limited guidance for the separation of regulated monopoly service from non-regulated PCS activities. Because there is no mechanism to distinguish a PCS cost from a telephone cost, it is not possible to prevent anti-competitive cost shifting from an LEC's competitive PCS venture to the LEC's telephony ratebase.⁶ Additionally, Part 64 was developed in an earlier day and context, and was not designed to cover a wireless industry which relies upon LECs for access to customers and is poised to compete in the local exchange market.

A second area of concern, and the one which presents the most serious risk to fair CMRS competition, is access to local exchange customer information. Customer proprietary network information ("CPNI") and customer access generated from monopoly local exchange franchise operations provide LECs with an enormous advantage and an inappropriate means of assisting their competitive affiliates. Unless the same information and access is fully available to non-LEC-affiliated competitors, its use specifically disadvantages wireless carriers and undermines competition, generally. Nor is there any public interest benefit associated with the LECs' ability to access CPNI;

⁵ NPRM, paragraph 22.

⁶ See Comments of Cox Enterprises, Inc., in the matter of Pacific Bell, Nevada Bell, Pacific Bell Mobile Services and Pacific Bell Mobile Services' Plan of Non-Structural Safeguards Against Cross-Subsidy and Discrimination ("Cox"), at 25.

absent such information, the LECs will simply have to market their services on the basis of information publicly available to all competitors.

In new Section 222 of the Communications Act of 1934, as amended, Congress recognized consumers' right to control the use of their CPNI by telecommunications carriers, and the importance of preventing carriers from using CPNI unfairly and anti-competitively. The Commission's pending CPNI rulemaking proceeding is a critical element of the nonstructural safeguards needed.

II. THE SAFEGUARDS TO BE EMPLOYED

A. Reporting Requirements for LEC Provision of CMRS Must be Strengthened

AirTouch supports the Commission's proposal to require that LECs establish separate affiliates to provide in-region competitive broadband PCS service, and that such affiliates meet specific separation conditions. However, separate affiliates should be required for LEC provision of *all* CMRS.

The Commission has proposed that all Tier 1 LECs providing broadband PCS in-region implement a nonstructural safeguard plan and file it for approval with the Commission. The Plan is to include:

- 1) a description of a separate affiliate for the provision of PCS, as specified in the Order;
- 2) a description of compliance with FCC Part 64 and Part 32 accounting rules, with copies of relevant CAM changes attached;
- 3) a description of planned compliance with all outstanding interconnection obligations;
- 4) a description of compliance with all network disclosure rules; and
- 5) a description of planned compliance with the CPNI requirements in new section 222 of the Act.⁷

The Commission also proposes that the separation conditions contained in the 1985 Competitive Carrier Fifth Report and Order (as modified) be invoked as a further safeguard against anti-competitive behavior. As the Commission has noted, the Fifth

⁷ NPRM, paragraph 116.

Report's separation conditions would impose the following requirements on the affiliate, which

- 1) must maintain separate books of account;
- 2) is prohibited from jointly owning transmission or switching facilities with the exchange company; and
- 3) is required to obtain any exchange telephone company-provided communications services at tariffed rates and conditions.⁸

Although AirTouch supports the Commission's audit proposals as being essential to the preservation of wireless service competition, we are concerned the proposed annual audits to be performed to "help determine compliance with (the Commission's) accounting, affiliate transaction, and allocation rules"⁹ may be inadequate.

As the Commission suggests, the LEC's Nonstructural Safeguards Plans are sufficient only for determining whether adequate accounting procedures are in place. The greater question — that of compliance — is thus placed squarely upon the audit process to which the public and wireless competitors have no input. Given that the audits are conducted only annually, AirTouch is concerned that the findings and conclusions, as well as any modifications which the Commission may require, will be generated too infrequently to protect the interests of parties who may be damaged by anti-competitive behavior on the part of the LECs. In the case of accounting safeguards and customer proprietary network information, in particular, more stringent rules are required.

Given the unfeasibility of convening audits on more than an annual basis and the significant threat that non-compliance holds for competitors and the consuming public, it would seem prudent to strengthen the LECs' reporting requirements. In this way, the parties with the greatest interest in minimizing anti-competitive activities will be able to support the Commission's audit efforts through their own reviews of the LECs' summary accounting information.

⁸ NPRM, paragraph 118.

⁹ NPRM, paragraph 120.

In accordance with suggestions made by various parties who commented on the Safeguards Plan submitted by Pacific Bell in this same GEN Docket, AirTouch endorses the suggestion that LECs disclose more fully – such as on a line-item basis – the costs and revenues associated with LEC-operated competitive PCS services. Such disclosure should be accompanied by an annual LEC certification to the Commission, signed by a corporate officer, that the LEC is in full compliance with the Commission's accounting safeguard rules. Cross-subsidization may thereby be more readily identified.¹⁰

However, AirTouch opposes the Commission's tentative conclusion to limit LEC PCS nonstructural safeguards to in-region broadband PCS service. Rather, non-structural safeguards used for LEC provision of PCS should also apply to the LECs' provision of other in-region CMRS services, including paging service, as required by Section 332 of the Communications Act of 1934.

Congress amended Section 332 to create a scheme which establishes regulatory parity among mobile services. Under this scheme, the FCC is obligated to prevent incidental distinctions among the mobile services from triggering significant differences in government requirements. Thus, the Commission is obligated to define commercial services broadly so that all functionally similar services are subject to similar regulation. Such a definition is an important part of establishing the anti-competitive safeguards proposed here by the Commission.

B. LEC CMRS Affiliates Should Not be Permitted Access to Local Exchange CPNI Absent Affirmative Written Authorization

Given the importance of customer information in the highly competitive CMRS market, the Commission should adopt CPNI rules expeditiously in its pending CPNI rulemaking.¹¹ AirTouch filed comments in that proceeding and incorporates them here by reference. The key point is that the LECs must have stricter limitations on their use of CPNI in the provision of competitive services than is warranted for the use of internal CPNI by non-LECs. To ensure that the LECs are not permitted unfair access to

¹⁰ Cox, at 52-53.

¹¹ See "Comments of AirTouch Communications, Inc.," in Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115.

local exchange CPNI for the provision of CMRS, affirmative written authorization from their local exchange customers must be obtained in advance.

The LECs should also be required to provide the opportunity for customers to authorize the provision of local exchange CPNI to third parties at the same time they seek to obtain written approval for LEC cross-marketing purposes. This approach will, as a practical matter, not only protect customers' reasonable privacy interests, but will also prevent the LECs from unfairly leveraging their monopoly-based customer information into competitive markets. (Of course, if customers authorize such disclosure, the LECs must make the information available to competing providers at the same time that it is made available to their own personnel.)

In establishing the requirements for written CPNI authorizations to be used by LECs, the Commission should use as its model the "anti-slamming" requirements set forth in Section 64.1150 of the Commission's rules. Using that approach, the Commission should require that LECs obtain written customer authorizations

- 1) that are separate from any promotional or other material sent by the requesting LEC, including any inducements that might be offered;¹²
- 2) that are signed and dated by the local telephone subscriber;¹³
- 3) that have print that is of sufficient size and is of a readable type to be clearly legible (e.g., 12 point or greater);¹⁴
- 4) that have unambiguous language confirming the subscriber's billing name and address, and each telephone number that is covered by the CPNI authorization; and
- 5) that explicitly state that the subscriber is aware that, although he or she knows that allowing the disclosure of local calling CPNI is not required, he/she nevertheless authorizes the release of such information to the LEC and its affiliates.¹⁵

To ensure that those customers who do not understand English are accommodated, the Commission should also require that if any portion of the local calling CPNI authorization is translated into another language, then all portions of that authorization must be translated into that language.

¹² Section 64.1150(b) and Section 64.1150(c).

¹³ Section 64.1150(b).

¹⁴ Section 64.1150(e).

¹⁵ Section 64.1150(e).

If a customer decides not to submit a signed, written authorization as requested by the LEC, then it must be treated by the LEC as a denial of consent and that consumer should not be re-solicited for a reasonable period of time (e.g., six months).

Those LECs which obtain customer approval to use local calling CPNI to market other telecommunications services should be required to have a corporate officer certify to the Commission on an annual basis that they are in compliance with the Commission's CPNI rules. Such a self-certification system would minimize the regulatory oversight costs for both LECs and the Commission.

Copies of the solicitation and consent forms used to obtain and record local calling CPNI authorizations should be placed in a public file established by the LECs (just as radio and television stations have long done regarding their FCC documents). Interested parties could then review those materials to ensure compliance with the Commission's rules.

AirTouch believes that CPNI gained through the provision by local exchange carriers of one type of competitive CMRS service should also be available for use by other LEC-affiliated competitive CMRS service providers. However, this endorsement assumes that the CMRS-to-CMRS exchange of CPNI is "direct" and without any intermediation on the part of the LEC. In this way, information generated from truly competitive ventures is shared only with other competitive ventures, and monopoly local exchange-generated customer information is held within the confines of the LEC.

AirTouch further supports the proposal that joint marketing of PCS and LEC landline service be permitted only on a "compensatory, arm's length basis" subject to the Commission's affiliate transaction rules.¹⁶ While authorized by Congress generally in the 1996 Telecommunications Act, joint marketing must not be undertaken in such a manner that it is a ready means of carrying out improper cross-subsidization of competitive services by monopoly providers.

¹⁶ NPRM, paragraph 119.

III. CONCLUSION

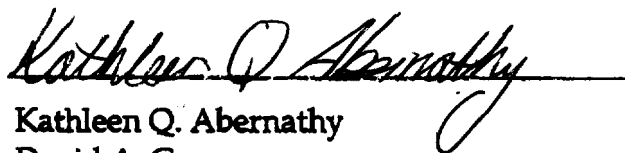
AirTouch supports the Commission's proposal to establish a specific, uniform set of competitive safeguards applicable to LECs' provision of CMRS. Competitive carrier separate affiliate requirements, combined with specific separation conditions, nonstructural safeguard plans, and arm's length joint marketing, should serve to strike a suitable balance between ensuring the LECs flexibility in structuring their competitive businesses, and providing the capability to detect any anti-competitive LEC behavior.

Specific requirements for line-item accounting to more fully disclose the costs and revenues of the LECs competitive CMRS ventures, and for necessary restrictions on the use of CPNI, will be of great value in protecting consumer interests and the competitive telecommunications marketplace.

Respectfully submitted,

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